NO. 44727-4-II

IN THE COURT OF APPEALS
OF
THE STATE OF WASHINGTON
DIVISION II

DEBBIE A. CRONN,

Appellant.

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON, AND
NORTHWEST STEEL AND PIPE, INC.,

Respondents.

CORRECTED BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

RULES

I. INTRODUCTION

This appeal arises out of a workplace injury in which the Appellant, Debbie A. Cronn, injured her left knee, right shoulder and left thumb while working as a trailer truck driver for Northwest Steel and Pipe, Inc. (Northwest Steel.) On November 7, 2002, as Ms. Cronn was exiting her truck cab she twisted her left knee when she stepped down onto the truck tire. As her knee twisted, she grabbed the cab rack and then injured her right shoulder and her left thumb.

Ms. Cronn filed an industrial injury claim with the Department of Labor and Industries (Department) under the Industrial Appeals Act. The Department accepted her claim. After providing Ms. Cronn with medical treatment and time-loss payments for several years, the Department determined that Ms. Cronn was at maximum medical improvement and closed her claim. Ms. Cronn protested the decision to the Department. After the Department reaffirmed its order, Ms. Cronn appealed to the Board of Industrial Insurance Appeals (Board.)

The Board affirmed the Department's decision, and Ms. Cronn appealed to Pierce County Superior Court. The Superior Court upheld the Board's decision. Ms. Cronn then brought her case before the Court of Appeals of the State of Washington.

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II. ASSIGNMENTS OF ERROR

A. The Trial Court committed reversible error by denying Plaintiff's Motion to Limit the Department Order of March 30, 2005 to address solely the condition of arthritis.

B. The Trial Court committed reversible error by interpreting the Department Order of March 30, 2005 as impliedly addressing a future medical condition that had not yet been diagnosed, and allowing the Department to preemptively segregate an undiagnosed condition.

C. The Trial Court committed reversible error by not finding that the Plaintiff's industrial injury was a proximate cause of her left knee condition.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Did the Trial Court err by denying Plaintiff's Motion to Limit the Department Order of March 30, 2005 to address solely the condition of arthritis, when in fact the Department Order explicitly addressed solely the condition of arthritis?

B. Did the Trial Court err by interpreting the Department Order of March 30, 2005 as impliedly and preemptively addressing the

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condition of aggravation of arthritis, a medical condition that would not be diagnosed until 2007, when all precedential case law establishes that a) aggravation of a condition is a separate condition from the underlying condition, and b) an undiagnosed medical condition that may or may not arise in the future cannot be preemptively segregated by the Department?

C. Did the Trial Court err by determining that Ms. Cronn's industrial injury was not a proximate cause of the Plaintiff's left knee condition, when in fact the industrial injury met the legal test of proximate cause?

IV. STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

This appeal arises out of a workplace injury in which the Appellant, Debbie A. Cronn, injured her left knee, right shoulder and left thumb while working as a trailer truck driver for Northwest Steel and Pipe, Inc. (Northwest Steel.) On November 7, 2002, as Ms. Cronn was exiting her truck cab she twisted her left knee when she stepped down onto the truck tire. Debbie A. Cronn Hearing Transcript, pg. 19-20; Daniel Brzusek, D.O. Deposition Transcript, pg. 11. She grabbed the cab

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rack and continued off of the vehicle. Cronn Transcript, pg. 19.

Ms. Cronn had previously had surgery on the same knee in 1996. As a result of the 2002 injury she had another surgery in 2003. In 2005, the Department issued an order denying the condition of arthritis as unrelated. At the time of that order it was true that she had a preexisting arthritic condition. It is also true that at the time of that order there was no proof of aggravation of the arthritic condition by the industrial injury. That proof came in 2007 when Ms. Cronn was seen by Daniel Brzusek, D.O.

All the medical testimony presented tells us she now needs a total knee replacement.

B. MEDICAL WITNESSES

Saleem Khamisani, M.D.

At the request of the Department of Labor and Industries, Saleem Khamisani, M.D., a neurologist, and Leland Rogge, M.D., an orthopedist, conducted an examination of Ms. Cronn on June 22, 2009. Saleem Khamisani, M.D. Deposition Transcript, pg. 10. Dr. Khamisani was the lead doctor on this exam. Khamisani, pg. 24. Dr. Khamisani understood that he was called to provide an opinion on a more-probable-than-not basis about whether Ms. Cronn needed further treatment for her left knee

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condition as caused by her industrial injury of November 2002. Khamisani, pg. 9.

Upon physical exam in 2009, Dr. Khamisani found Ms. Cronn to have a valgus deformity of her left knee: an angulation at the knee joint that is not normally present. Khamisani, pg. 14-15. She could bend her right knee fully while squatting, but she could only bend the left knee up to 90 degrees. Khamisani, pg. 14. She lacked 15 degrees of extension in her left knee as compared with the right. Khamisani, pg. 14. Extension of her left knee caused pain. Khamisani, pg. 14. The doctors found some swelling in the left as compared to the right and she was tender in the medial and lateral joint lines on the left knee. Khamisani, pg. 16.

As a result of his examination of Ms. Cronn, Dr. Khamisani diagnosed 1) a left knee lateral meniscus tear; strain/sprain related to the industrial injury of November 7, 2002; and 2) the subsequent development of degenerative arthritis related to and proximately caused by the industrial injury of November 2, 2002 on a more probable-than-not basis. Khamisani, pg. 17, 23. Dr. Khamisani recommended possible total knee replacement on the left. Khamisani, pg. 18.

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Dr. Khamisani explained that the second diagnosis, the subsequent development of arthritis related to the industrial injury, was also one of the causes for the need for knee replacement. Khamisani, pg. 21-22.

Dr. Khamisani explained that his first diagnosis, the lateral meniscus tear and the left knee sprain related to the industrial injury, was one of two causes for requiring total knee replacement. Khamisani, pg. 21.

Daniel Brzusek, D.O.

At the request of Ms. Cronn, Daniel Brzusek, D.O., a physiatrist, examined her on two occasions - February 22, 2007, and on January 28, 2011. Daniel Brzusek, D.O. Deposition Transcript, pg. 9.

As a result of his 2007 examination of Ms. Cronn, Dr. Brzusek diagnosed an antecedent history of a knee problem in 1996 with previous arthroscopic partial lateral meniscectomy. He also diagnosed the following as being caused by the November 7, 2002 industrial injury: moderately severe sprain and strain of the left knee; aggravation of pre-existing arthritis of the left knee; post-traumatic patellofemoral pain; and aggravation of antecedent chondromalacia. Brzusek, pg. 18-19.

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As a result of his 2011 examination of Ms. Cronn, Dr. Brzusek diagnosed an antecedent history of knee injury several years before the 2002 industrial injury. He also diagnosed the following as being caused by the industrial injury of November 7, 2002: status post-meniscectomy; moderately severe sprain and strain of the left knee; aggravation of pre-existing arthritis of the left knee; mild post-traumatic patellofemoral pain; and progressive deterioration and development of additional arthritis as a result of the aggravation of left knee due to the industrial injury. Brzusek, pg. 24-25.

In a comparison of the left knee exam he performed in 2007 to the one he performed in 2011, Dr. Brzusek concluded her left knee was definitely getting worse. Brzusek, pg. 23. Her gait was worse and patellar testing was worse. Brzusek, pg. 21. She had less range of motion and was functionally worse at the time of the 2011 exam than she was in the 2007 exam. Brzusek, pg. 23.

Dr. Brzusek believes that Ms. Cronn's need for knee replacement is partially related to her 2002 industrial injury. Brzusek, pg. 28. Dr. Brzusek opined that Ms. Cronn's sprain and tear in her left knee are causes of her need for further treatment. Brzusek, pg. 29.

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Dr. Brzusek diagnosed progressive deterioration and development of additional arthritis as a result of the aggravation of her left knee due to the injury of November 7, 2002, and mild post-traumatic patellofemoral pain as result of the injury. Brzusek, pg. 24-25.

Dr. Brzusek felt the industrial injury caused additional meniscus tear, with arthroscopic surgery that failed. Brzusek, pg. 25-26. The industrial injury caused an aggravation of a pre-existing, but asymptomatic, arthritis in her knee as a result of the 2002 industrial injury. Brzusek, pg. 26. Dr. Brzusek explained that based on the tear and sprain from the industrial injury that additional springs were removed from her knee. Brzusek, pg. 29. This creates more grinding of the bones together, rather than a nice smooth cartilage protecting the bones from each other. Brzusek, pg. 29. When part of the cartilage is removed, it predisposes that knee to developing arthritis. Brzusek, pg. 26. Ms. Cronn was working full time, having no problems, and was asymptomatic until this injury occurred in November 7, 2002. Brzusek, pg. 26. The only treatment available is a knee replacement. Brzusek, pg. 27, 49-50.

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Dr. Brzusek stated that Ms. Cronn's knee tear and sprain are a cause for need for further treatment. Brzusek, pg. 29. She needed further treatment because she had a tear. She received the appropriate treatment, which is arthroscopic surgery; unfortunately, it was not a good result. Brzusek, pg. 29. Each meniscectomy takes a chunk of the springs, and when the spring is taken out, more trauma is created to the bones of the knee. Brzusek, pg. 50.

Michael Barnard, M.D.

At the request of the Department of Labor and Industries, Michael Barnard, M.D., an orthopedist, examined Ms. Cronn on April 20, 2010. Dr. Barnard rated Ms. Cronn's left knee with a permanent partial impairment of 9 percent. Michael Barnard, M.D. Deposition Transcript, pg. 22. He said she had a severe arthritic condition at the time of the industrial injury. Bucket handle tears cause severe arthritis. The industrial injury is not a cause of the need for a total knee replacement.

Timing of Medical Evidence Regarding Aggravation of Arthritis

The first medical evidence or indication that the industrial injury had aggravated or potentially aggravated any preexisting arthritis in Ms.

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Cronn's left knee was in 2007. Khamisani, pg. 20. The doctor referenced Dr. Brzusek's 2007 report. See Khamisani, pg. 19, 20-21. Dr. Khamisani reviewed records and opined that based on the medical evidence from 2002, the time of her injury, up to early March 2005, there was not any medical evidence in the records indicating that the industrial injury had aggravated any arthritis in her knee. Khamisani, pg. 18. The first medical record that Dr. Khamisani noted that made the relationship between aggravation of left knee arthritis by this injury was in a record from 2007 by Dr. Brzusek. Khamisani, pg. 28.

Similar to Dr. Khamisani, Dr. Brzusek testified that according to his review of the medical records, from records from the 2002 injury through records up to March 2005, there was no medical evidence in the record that the industrial injury had aggravated or potentially aggravated any arthritis in her knee. Brzusek, pg. 19. She had symptoms, but no one actually connected the dots. Brzusek, pg. 40. In 1996, she probably did not have arthritis; she had a tear of the lateral meniscus. Brzusek, pg. 50-51. X-rays in 2009 showed degenerative arthritis. See Brzusek, pg. 52-53. It was not until he saw her in 2007 that the connection was made. See Brzusek,. pg. 19.

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V. ARGUMENT

A. The Industrial Appeals Act Considers Aggravation of an Existing Condition to be a Separate Condition from the Existing Condition.

1) Subsequent aggravation of a condition causally related to an industrial injury which arises after the date of an unappealed order is not considered res judicata:

> "The rule is that an order of the supervisor from which no appeal is taken is res judicata as to any issue Before the department at the time it was entered, but is not res judicata as to any aggravation occurring subsequent to that date. *Donati v. Department of Labor and Industries,* 1949, 35 Wash.2d 151, 211 P.2d 503."
>
> *Karniss v. Department of Labor and Industries*, 39 Wn.2d 898, 900-01 (1952)

2) Aggravation that occurs after the date of an unappealed order does not prevent the inclusion of the aggravation in the claim:

> "Where an alleged condition was not Before the Board at the last prior closure of a claim, the unappealed closure order does not operate as a terminal date regarding aggravation of that alleged condition."
>
> *Grimes vs. Lakeside Industries*, 78 Wn.App. 554, 564 (Wash.App. Div. 2 1995)

3) When a finding does not clearly state whether or not the cause of the aggravation is an industrial injury, litigation of the claimed aggravation is allowed:

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> "In the absence of a clear and unmistakable final finding that a condition is neither caused by nor aggravated by an industrial injury, a workman should not be precluded from thereafter litigating the causal relationship between the injury and his condition."
>
> *King v. Department of Labor & Indus.*, 12 Wn. App. 1, 4 (1974)

B. The Department Order At Issue Does Not Address Aggravation of Arthritis.

4) The plain language and express terms used in the March 30, 2005 decision issued by the Department make it clear that the decision does not address the issue of aggravation:

> Notice of Decision
>
> The department denies responsibility for the following condition, arthritis of left knee, determined by medical evidence to be unrelated to the industrial injury for which this claim was filed.
>
> We will not pay the bills for medical treatment of this condition.
>
> Supervisor of Industrial Insurance
> By Wesley G Brand
> Claims Manager
> (360) 902-4405

C. Res Judicata Does Not Apply to the Aggravation of Ms. Cronn's Arthritis Because the Issue Was Not Addressed by the March 30, 2005 Department Order.

5) Two necessary elements of res judicata are same subject matter and same cause of action, elements that are not present in Ms. Cronn's case:

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> "The purpose of the doctrine of res judicata is to ensure the finality of judgments. Under this doctrine, a subsequent action is barred when it is identical with a previous action in four respects: (1) same subject matter; (2) same cause of action; (3) same persons and parties; and (4) same quality of the persons for or against whom the claim is made. *Norco Constr., Inc. v. King County,* 106 Wash.2d 290, 293 (1986)."
>
> *Hayes vs. City of Seattle*, 131 Wash.2d 706, 712 (1997)

6) Regarding the element of subject matter, Ms. Cronn's aggravation claim does not involve the same subject matter as the original industrial injury claim. Even if two claims share some of the same facts, they can involve different subject matter:

> "We are satisfied that the two lawsuits with which we are here concerned do not involve the same subject matter simply because they both arise out of the same set of facts. Indeed, in *Mellor v. Chamberlin,* 100 Wash.2d 643 (1983), a case in which a single real estate transaction produced two lawsuits, we so held . . . In ruling against the sellers, we held that "[a]lthough both lawsuits arose out of the same transaction (sale of property), their subject matter differed" and the second suit was therefore not barred by res judicata. Mellor, 100 Wash.2d at 646."
>
> *Hayes vs. City of Seattle*, 131 Wash.2d 706, 712 (1997)

7) Regarding the element of cause of action, impairment of the interests established in Ms. Cronn's original industrial injury claim and presentation of substantially the same evidence are two necessary factors. In this case, the interests established in the original claim are not impaired

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by the aggravation claim, nor is substantially the same evidence presented. The causes of action in this case are not identical:

> "(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Costantini v. Trans World Airlines,* 681 F.2d 1199, 1201-02 (9th Cir.), cert. denied, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982))."
>
> *Rains v. State,* 100 Wash.2d 660, 664, 674 P.2d 165 (1983)

8) Res judicata cannot apply if a necessary fact concerning the matter at issue could not have been raised in previous litigation. Ms. Cronn's aggravation of arthritis was diagnosed on February 22, 2007, which is 23 months after the Department's March 30, 2005 decision. It is clear that a necessary fact – the diagnosis of aggravation – was not in existence at the time of the March 30, 2005 Department decision. Therefore, res judicata cannot apply in Ms. Cronn's case:

> "In general, one cannot say that a matter should have been litigated earlier if, for some reason, it could not have been litigated earlier; thus, res judicata will not operate if a necessary fact was not in existence at the time of the prior proceeding, or if evidence needed to establish a necessary fact would not have been admissible in the prior proceeding."
>
> *Kelly-Hansen vs. Kelly-Hansen*, 87 Wn.App. 320, 330-31 (1997)

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9) As stated by the U.S. Supreme Court, the application of res judicata to Industrial Insurance Act claims is generally looked upon with disfavor. The Legislature recognized that all harmful consequences of an injury *might not have become apparent* at the time of the initial award. It also recognized that the Industrial Insurance Act must be adaptable to the facts relating to the injury *as those facts actually develop:*

> "It was exactly to prevent such rigid finality that the statute preserved both the Department's unlimited power to reopen the case and the employee's power to have it reopened as a matter of right during the limited period. From the beginning the Act seems to have been drawn to avoid the crystallizing effects of the doctrine of res judicata in relation to awards, whether as against the employer or the employee. The idea apparently was that the initial award for an injury would afford compensation for harms then apparent and proved. But it was recognized, on the one hand, that all harmful consequences might not have become apparent at that time and, on the other, that harms then shown to exist might later be terminated or minimized. *Cf. Choctaw Portland Cement Co. v. Lamb,* 79 Okl. 109, 110, 189 P. 750. The purpose of the provisions for reopening, whether at the instance of the employer, the employee, or the Department, cf. notes 5 and 14, obviously was to prevent the initial award from finally cutting off power to take account of these later frequent developments. It was to maintain a mobile system, capable of adapting the amount of compensation from time to time in accordance with the facts relating to the injurious consequences for disability as they actually develop, not to cut off rigidly the power either to increase or to decrease the compensation once an award had become 'final' for purposes of appeal."
>
> *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 306, note 15 (1945)

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D) The Evidence Regarding the Plaintiff's Aggravation is Relevant and Admissible.

10) The excluded testimony regarding Ms. Cronn's arthritis is relevant per Rule 401 and Rule 402 of the Washington Rules of Evidence.

Rule 401:

> ''Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Rule 402:

> "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

11) The testimony regarding Ms. Cronn's aggravation of arthritis meets the relevance threshold established by the Washington Supreme Court and it is admissible per those standards:

> "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' ER 401. 'The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.' *State v. Darden,* 145 Wash.2d 612, 621, 41 P.3d 1189 (2002). And relevant evidence need provide only 'a piece of the puzzle.' *Bell v. State,* 147 Wash.2d 166, 182, 52 P.3d 503 (2002)."
>
> *State vs. Lord,* 161 Wn.2d 276, 301 (2007)

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12) Because the aggravation of Ms. Cronn's arthritis is at the heart of her case, the Trial Court's ruling to exclude evidence of aggravation is clearly prejudicial. Because the erroneous evidentiary ruling here is prejudicial, then sufficient grounds for reversal do exist:

> "The question here, then, is whether the error was prejudicial, for error without prejudice is not grounds for reversal. *Thomas v. French,* 99 Wash.2d 95, 104, 659 P.2d 1097 (1983). Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial. *James S. Black & Co. v. P & R Co.,* 12 Wash.App. 533, 537, 530 P.2d 722 (1975)."
>
> *Brown vs. Spokane County Fire Protection District No. 1*, 100 Wn.2d 188, 196 (1983)

E) Ms. Cronn's Industrial Injury Meets the Test of Proximate Cause Regarding the Aggravation of Her Pre-Existing Arthritis.

13) The fact that Ms. Cronn suffered from pre-existing arthritis at the time of her injury does not preclude the aggravation of her arthritis from coverage under the Industrial Insurance Act:

> "Moreover, we have long recognized that benefits are not limited to those workers previously in perfect health. Groff v. Department of Labor & Indus., 65 Wn.2d 35, 44, 395 P.2d 633 (1964); Kallos v. Department of Labor & Indus., 46 Wn.2d 26, 30, 278 P.2d 393 (1955); Jacobson v. Department of Labor & Indus., 37 Wn.2d 444, 448, 224 P.2d 338 (1950); Miller v. Department of Labor & Indus., 200 Wash. 674, 682-83, 94 P.2d 764 (1939).

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> It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness. The theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated. Miller, at 682-83. The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities. Wendt v. Department of Labor & Indus., 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977).
>
> Thus, we have repeatedly recognized in a long line of cases that where a sudden injury "lights up" a quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is attributable to the injury and compensation is awardable. See, e.g., Harbor Plywood Corp. v. Department of Labor & Indus., 48 Wn.2d 553, 295 P.2d 310 (1956); Ray v. Department of Labor & Indus., 177 Wash. 687, 33 P.2d 375 (1934) (preexisting dormant arthritic condition lighted up and made active by injury). In Harbor Plywood Corp., this court held compensation was due where the evidence established that an industrial injury aggravated a preexisting nonwork-related cancer, causing acceleration of the employee's death due to cancer.
>
> *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 471-72 (1987)

14) If reasonable minds differ regarding an interpretation of the Industrial Insurance Act, then the decision should be made in favor of the injured worker:

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"[W]here reasonable minds can differ over what Title 51 RCW provisions mean..., the benefit of the doubt belongs to the injured worker."

Harry v. Buse Timber Sales, Inc. 201 P.3d 1011, 1012 (2009).

VI. CONCLUSION

Ms. Cronn never received notice that the Department segregated the condition of aggravation of arthritis. The March 30, 2005 decision that the Department relies upon in making its case does not even include the word "aggravation." The condition of aggravation was not diagnosed until over 23 months after the Department decision. The Department could not have segregated a condition that had not even been diagnosed.

The condition of *aggravation* of arthritis is a medically and legally separate condition from the underlying arthritis. The plain language of the Department Order clearly addresses only the issue of whether the arthritis that may have existed at the time of the industrial injury was caused by the industrial injury.

Nowhere in the Department Order is the issue of aggravation addressed. The word aggravation is nowhere present, nor any synonym thereof used, nor any combination of words expounded that when read together would indicate or even imply that aggravation is at issue. All

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relevant case law demonstrates that if an aggravation is not specifically mentioned in a Department Order, then it is not covered by the order.

Ms. Cronn's 2002 industrial injury claim did not incorporate aggravation of her pre-existing arthritis. No medical finding of aggravation was made until February 22, 2007, a date that arrived more than 23 months after the Department's decision. The Department asks that the Court interpret its March 30, 2005 order to segregate a condition *that had not yet been diagnosed.* If the Court accepts the Department's interpretation of its order, the Court is in effect giving approval to the unprecedented concept of *preemptive segregation* of conditions.

The public harm that could be caused by giving the Department power to preemptively segregate a condition that does not yet exist could be immense. The Department's interpretation of its order and of the law is both incorrect and against public policy.

Regarding whether the industrial injury is the proximate cause of Ms. Cronn's need for treatment, the proximate cause principles as long set forth by the Washington courts support the Plaintiff's arguments that the industrial injury is a proximate cause for her need for treatment. The injury need only be one cause among several causes in order for acceptable causation to exist.

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RESPECTFULLY SUBMITTED this 25th day of June, 2013.

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CERTIFICATE OF SERVICE

I certify that I served, or caused to be served, a copy of the foregoing CORRECTED BRIEF OF APPELLANT on the 25th day of June, 2013, to the following at the following addresses:

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DATED this 25th day of June, 2013.

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